

Opinion No. 43-4238

February 17, 1943

BY: EDWARD P. CHASE, Attorney General

TO: Mr. R. H. Grissom, Educational Budget Auditor, Office of State Comptroller, Santa Fe, New Mexico

We are in receipt of your letter of February 8, 1943, which we regret to have taken so long in answering, but due to the extra work during the session of the Legislature, this has been our first opportunity to answer.

In your letter you stated that in a school district which had qualified for a budget under the school law, all the pupils who had been attending the school have ceased to attend. You ask our opinion as to whether or not the County School Board should continue to pay the teacher's salary under the contract previously entered with him.

Section 55-606 of the 1941 Compilation referred to by you provides in part that

"No school shall be maintained, or budget allowance be made in any school district of this state unless said school shall have an average daily attendance of at least eight pupils."

By virtue of this provision, the school in question should be closed, and in order to close the school, all salaries in connection therewith must cease. The only question involved is whether or not the County School Board, by entering a contract with the teacher involved, waived this right by failing to make provision in the contract for termination of the contract under the circumstances set forth in the statute cited above.

The Supreme Court of New Mexico, in *Smith vs. Directors Insane Asylum* 19 N.M. 137, were confronted with an almost identical question. There, Dr. Smith had been employed by contract for a period of five years. Within five years, the board removed Dr. Smith from such position under a provision of the law that

"The Board of Directors shall have power to remove any officer or employee of said insane asylum when, in their judgment, it is to the best interest of said institution."

There, the Court, in upholding the right of the asylum board to remove Dr. Smith, without liability to itself despite the existence of the contract, said:

"The statute became a condition of his contract as much as if it was written in it, that that board might remove him at pleasure. He accepted employment with knowledge of the law on this condition of his contract, and he has no reason to complain of it."

While a person may waive protection afforded him by a statute, this is not true where matters of public interest are concerned, as is the case of the closing of a school when the daily attendance falls below a certain figure. In dealing with this question, the Court, in the Smith case, supra, said:

"It is undeniably the law that a party may waive the advantage of a statute intended for his sole benefit, but there are grave reasons why a law enacted from proper consideration should not be abrogated or waived by mere private agreement."

In view of the foregoing, it is my opinion that a teacher who enters a contract with a county school board does so in contemplation of Section 55-606, and so when the daily attendance of the school in which he was employed to teach falls below eight pupils, that the school board must close said school, and the contract with the teacher will thereby be terminated without liability to the county school board.

Trusting that the foregoing sufficiently answers your inquiry, I am

By ROBERT W. WARD,

Asst. Atty. General